In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1491

TWO TRACTS OF LAND, ET AL., PETITIONERS

v.

TENNESSEE VALLEY AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

These are four condemnation actions brought by the TVA, pursuant to Sections 4(h), 4(i), and 25 of the TVA Act, 16 U.S.C. 831c(h), 831c(i), and 831x, to acquire land for the "Land Between the Lakes" project, which is a demonstration in conservation, reforestation, recreation and other resource development in a 170,000-acre area between Kentucky and Barkley Lakes in Kentucky and Tennessee.

In 1963 the President directed TVA to undertake the Land Between the Lakes project as a demonstration under Section 22 of the TVA Act, 16 U.S.C. 831u

470-392—72

(Pet. 4–5).[1] Congress appropriated funds for the project in 1963 and each year thereafter.[2]

Petitioners contend (1) that TVA is without statutory authority to take their property because the project is not a demonstration within the meaning of Section 22, and (2) that TVA acted arbitrarily, capriciously, and in bad faith in that it was, in fact, taking property to resell at a profit.

1. The Land Between the Lakes project is a demonstration project of the kind the President is specifically authorized to undertake by Section 22. Accordingly, the condemnations were lawful.

During Senate debate on the appropriation for fiscal year 1964, Senator Hill of Alabama, speaking for the majority members of the Senate Appropriations Committee whose recommendation for an appropriation for the project was thereafter adopted, stated:

> Development of the Land Between the Lakes is precisely the type of demonstration contemplated by section 22 of the Tennessee Valley Authority Act. * * *
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> * * * There will be hunting and fishing and water sports. There will be primitive camping areas and areas for families and for groups. The whole development will provide an outdoor classroom in conservation. * * * There is no development like this anywhere in the United

[1] See Presidential Press Release of June 14, 1963 (Pet. App. 22–23).

[2] A reference to congressional action funding the project from 1963 through 1971 is attached as an appendix to the opinion of the court of appeals (Pet. App. 28). For fiscal year 1972, see H. Rep. No. 92–381, 92d Cong., 1st Sess., 80; S. Rep. No. 92–327 at 58; H. Conf. Rep. No. 92–479 at 32; 85 Stat. 365.

> States. This multipurpose park will provide the information which Congress and the States will need. It will demonstrate the kind of recreation areas needed in the future to serve our urbanized and industrialized society [110 Cong. Rec. 18518–18519].

Moreover, the scope of the project, involving 170,000 acres, was specified by the President (see note 1, *supra*), and its precise boundaries were shown on a map used during the appropriations hearings (Pet. App. 27 n. 2). Congress has had all this information before it and has continued to make appropriations for the project, notwithstanding objections to the project during the appropriations hearings similar to those made by petitioners.[3]

Thus, by its continued annual appropriations of funds for this project since 1963, Congress has expressed agreement with the President's and TVA's construction of Section 22 as authorizing the type of demonstration being conducted in Land Between the Lakes. This history of informed and deliberate congressional action "constitutes ratification of administrative construction, and confirmation and approval of the [agency's action]." *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275, 293–294. See, also, *Brooks* v. *Dewar,* 313 U.S. 354, 361; *Fleming* v. *Mohawk Co.,* 331 U.S. 111, 116.

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[3] *Hearings on H.R. 11579 before the Subcommittee of the Senate Committee on Appropriations, Atomic Energy Commission, Tennessee Valley Authority* 88th Cong., 2d Sess.; *Hearings before Subcommittee of the House Committee on Appropriations,* 88th Cong., 2d Sess., pt. 3; *Hearings on H.R. 9220 before the Subcommittee of the Senate Committee on Appropriations,* 89th Cong., 1st Sess., pt. 4.

2. Petitioners' second contention—that TVA acted arbitrarily, capriciously, and in bad faith by taking land "in excess of the land necessary" for this demonstration project in order "ultimately" to resell it at a profit—was correctly held to be without factual basis and does not merit further review. The complaint and declaration of taking in each of these actions state that the

> * * * public use for which the property is taken is the development, construction, operation, and maintenance of the Land Between the Lakes Recreation Demonstration.

It is undisputed that these properties are within the 170,000 acres whose acquisition and use for the project the President expressly directed. Accordingly, the courts below correctly held that TVA did not act in bad faith in acquiring the property. As this Court stated in *Berman* v. *Parker*, 348 U.S. 26, 35–36:

> It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose had been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch. See *Shoemaker* v. *United States*, 147 U.S. 282, 298; *United States ex rel. T.V.A.* v. *Welch*, *supra*, 554; *United States* v. *Carmack*, 329 U.S. 230, 247.

Finally, the court of appeals properly took judicial notice (Pet. App. 26–27) that the question of TVA's alleged intention to resell property was raised during the congressional hearings and expressly denied by TVA Board Chairman Wagner, and that Congress

thereafter continued to appropriate funds for the project.[4]

Petitioners apparently are dissatisfied with the type of demonstration TVA is conducting or believe that a demonstration should not be conducted at all. But such policy complaints should be addressed to Congress and not to the courts. Cf. *United States* v. *2,606.84 Acres of Land in Tarrant County, Tex.*, 432 F. 2d 1286 (C.A. 5), certiorari denied. 402 U.S. 916.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1972.

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[4] The court of appeals' reference was to a statement by Mr. Wagner during the 1964 Senate appropriations hearings which was, in part, as follows:

"Mr. WAGNER. Now the last point you mentioned, Senator, was that some people said that TVA intended to buy 8,000 acres of this land and then resell it for commercial purposes. Such a statement is just a plain lie, Senator Cooper, and let me say it irritates me very much. We have made it clear from the beginning that we thought that for this area, to fulfill the purpose which we believe it can serve to the benefit of the people of this Nation, it must be completely in public ownership and used for recreation within the boundaries that we have described.

"We have never had any idea that we would resell any of that land for private use * * *" (*Hearings on H.R. 11579 before a Subcommittee of the Senate Committee on Appropriations, Atomic Energy Commission, Tennessee Valley Authority*, 88th Cong., 2d Sess., 30).

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